Supreme Court, U. S.
FILED
JUL 7 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1628

IRVING DAVID RUBIN,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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I. OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, reproduced as Appendix A of the petition, is reported in 96 Cal. App.3d 968 and 158 Cal.Rptr. 488.

II. JURISDICTION

Although this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) by petitioner, nevertheless this is not a case involving review of a final judgment. (See Part B of our argument, infra.)

III. QUESTIONS PRESENTED

Assuming this Court's jurisdiction has been properly invoked, petitioner adequately frames the question that should be presented to this Court.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

Fourteen Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

California Penal Code Section 653f, subdivision (b):

> "Every person who solicits another to commit or join in the commission of murder is punishable by imprisonment in the state prison . . . ."

California Penal Code Section 995: "The . . . information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: * * * If it be an information: * * * 2. That the defendant had been committed without reasonable or probable cause."

V. STATEMENT OF THE CASE[1/]

1. We find it necessary to submit our own statements of the case and the facts because we believe that petitioner's statement (at pages 2-5 of the petition) is seriously misleading in certain material respects. The Clerk's Transcript on Appeal will be hereinafter cited as "C.T." The Reporter's Transcript on Appeal will be hereinafter cited as "R.T." The majority and dissenting opinions of the Court of Appeal will be, unless otherwise noted, cited to both the California Official Reports and as printed in the petition. The only material error in petitioner's printing of the Court of Appeal's opinion appears on page 8a, where the passage purportedly constituting the last sentence in the paragraph containing quoted material reads: "Generally speaking, the more serious crime of all, carries the longest time span of any crime, as shown by the lack of any time limitation on its prosecution (Pen. Code, § 799) and a threat of murder can be imminent at a time when a threat of trespass is not." The passage should read: "Generally speaking, the more serious the crime the greater its time span. Murder, the most serious crime of all, carries the longest time span of any crime, as shown by the lack of any time limitation on its prosecution (Pen. Code, § 799) and a threat of murder can be imminent at a time when a threat of tespass is not." (96 Cal.App.3d at 979.)

A complaint was issued on April 3, 1978, charging petitioner with having solicited the commission of the crime of murder on or about March 16, 1978. A preliminary hearing was conducted on June 9, 1978 concerning the alleged solicitation.

Officer William Chambers, Los Angeles Police Department, testified at the preliminary hearing that at about 9:30 a.m., March 16, 1978, he was present at a press conference held at the Los Angeles Press Club. (C.T. p. 8.) He saw six or seven representatives of the press present at the conference, as well as petitioner. (C.T. pp. 8-9.) Chambers tape-recorded the conference until the tape ran out. (C.T. pp. 9, 12-14.) The officer stated that, "From the time the tape ended, I don't have any personal recollection of what exactly was said, to be able to comment on that [i.e., the officer's recollection of what the conversation was immediately when the tape ran out]." (C.T. p. 12.) However, "there wasn't a great deal of conversation after that. That was more or less the wrap up of the press

conference." (C.T. p. 14.) A copy of a 28-page transcript of petitioner's tape-recorded remarks at the press conference (identical with that read and considered by the trial judge except for two or three misspellings) is set forth at pages 136-163 of the Clerk's Transcript.

The 28-page transcript discloses that the press conference conducted by petitioner as a spokesman for the Jewish Defense League on March 16, 1978 pertained to the expected April 20th, 1978 march by Nazis in Skokie, Illinois. During the course of the press conference the following colloquy took place:[2/]

"Q: I need to get one thing clarified before I go off here, ah the $500 reward . . .

"R: Right.

"Q: Ah that is not just blanket for any Jew or Gentile who maims or seriously injures any member of the Nazi party. Is that for anybody who does this in defense of the Jewish . . .

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2. The speaker symbolized by "R" in the transcript was petitioner.

"R: That's in defense of the Jewish or Gentile community.
"Q: So it would be incorrect to say just a blanket offer.
"R: You could say it's a blanket offer, providing that they could prove that it was in the defense of the community.
"Q: Of the Jewish community?
"R: Or Gentile community. It makes no difference. It makes no difference to us.
"U: Just a Nazi.
"U: American Nazi. Kills, maims, or injures.
"R: American Nazi, Ku Klux Klan.
"U: Kills, maims, or injures . . .
"R: National States Rights Party, any scumbag you want to choose.
"Q: Okay, so let's get the maims, injures, and what else?
"R: Pardon me?
"U: Kills.
"Q: Kills, maims, or injures.
"R. Seriously injures. Seriously. Put that word, put that adjective, 'seriously.'

"Q: I got that one.

"Q: Um, what about the Nazi movement here in Los Angeles." (C.T. pp. 10-11; 146-147.)

Thereafter, after further discussion between petitioner and press representatives, petitioner made the following statement apparently in response to a request that he restate the substance of his position:

"R: We wish to announce two events. On April twentieth, a number of Neo-Nazis perhaps, a hundred fifty, perhaps two hundred, will march into the Jewish area in Skokie, Illinois. We the Jewish Defense League of the West Coast and the East Coast will amass at least five thousand to six thousand people in that area, to literally stop the Neo-Nazi movement. We're not going there under the intention to be pacifists. They like to have a nice non-violent quiet protest. We're going there to take names and bury them if we have to. We're not going to allow Neo-Nazis to come into Skokie and advocate the Judacide of the Jewish people there. We're

not going to allow them, with stench of the crematoria still existing in that city, with seven thousand survivors with numbers on their arms. We're not gonna allow them to be insulted, intimidated again by Nazis. We believe if we would have done it thirty years ago there might have been a different story. Many more Jews would have been alive today. And we're going there and we're sponsoring the way of people. If they don't have the money, we're providing them a round-trip ticket from Chicago, Los Angeles, it'll cost us -- we now have a travel agent who is going to eliminate his commission, and it'll cost us between a hundred and sixty, a hundred seventy dollars per person. If the individual cannot afford his way, we the Jewish Defense League will be sponsoring him, providing he meets our qualifications. The qualifications is [sic]: that he is of sound mind and he is of sound body. And I mean that he is able-willing, ready, and able to handle himself or herself in the streets.

"Q: Are you really . . .
"R: And that means. We also have an added feature. We are offering five hundred dollars, that I have in my hand, to any member of the community, be he Gentile or Jewish, who kills, maims, or serious injures a member of the American Nazi Party. This offer is being made on the East Coast, on the West Coat [sic]. And if they bring us the ears, we'll make it a thousand dollars. The fact of the matter is, that we're deadly serious. This is not said in jest, we are deadly serious. In the defense of the Jewish community, should any Nazi even dream of attacking a Jew like they did [end of tape.]"[3] (C.T. pp. 162-163.)

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3. This last paragraph (lines 12-22 of page 163 of the Clerk's transcript) is egregiously misstated as follows at pages 3-4 and 10-11 of the petition: "Finally, it was only at the end of the tape, much later in the press conference, that Mr. Rubin reiterated his offer of $500.00 to any member of the community in Skokie who kills, maims or seriously injures a member of the American Nazi party in the defense of the Jewish community, should any Nazi dream of attacking a Jew like they did [end of tape.] (Emphasis added.)"

It was during the course of making his statement about the "added feature" concerning the $500 offer that petitioner displayed five $100 bills. (C.T. pp. 9-10.)

At the conclusion of the preliminary hearing, the magistrate held petitioner to answer with respect to the charged offense.[4/] (C.T. p. 38.)

An information was filed on June 26, 1979 alleging in one count that petitioner had, on or about March 16, 1978, violated Penal Code Section 653f by having "solicit[ed] another to commit and join in the commission of the crime of murder, in violation of Section 187, of the Penal Code of the State of California." (C.T. p. 170.)

On September 11, 1978, petitioner noticed a motion to set aside the information pursuant to Penal Code Section 995.

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4. The innuendo of the second complete paragraph on page 4 of the petition compels us to set forth at pages 1a-2a of the Appendix hereto a colloquy between defense counsel and the magistrate. It clearly shows that the magistrate's remarks quoted in the petition were responsive to defense counsel's comments and that the former held petitioner to answer because he thought there was probable cause to do so. (C.T. p. 37, line 2 to p. 38, line 7.)

(C.T. p. 101.)

The hearing on the 995 motion commenced on October 27, 1978 (C.T. p. 42) and concluded on January 18, 1979 (R.T. pp. 19-74.) The First Amendment issues had not been litigated at the preliminary hearing. However, it was agreed by counsel and the trial judge that the issue could be properly considered at the hearing on the motion to set aside the information pursuant to Penal Code section 995. (R.T. p. 53, line 20 to p. 55, line 5.) The argument at the hearing proceeded first to consider the motion under "conventional standards" and then as it pertained to First Amendment issues. (R.T. p. 23, lines 16-24.)

After the first phase of the argument the trial judge concluded that the magistrate had probable cause to believe that respondent solicited the commission of the crime of murder. (R.T. p. 53, lines 2-8. See also R.T. p. 23, lines 14-24; p. 36, lines 9-22; p. 42, lines 24-28; p. 47, line 10 to p. 49, line 4; p. 49, line 27 to p. 51, line 2.) However, after the second phase of the argument, the trial judge concluded "that in the Court's opinion the language used by Mr. Rubin falls

within the language protected by the First Amendment." (R.T. p. 72, lines 23-26; see also, R.T. p. 73, lines 19-21.) As he more fully explained:

> "I do feel that viewing the defendant's statement in its proper context I must agree with the comments that appear on page 11 of the Amicus brief, line 1, where they state:
>
> 'Amicus contend that the form and contents of Rubin's communication were used solely to attract nationwide media exposure. The contents evidence a lack of any serious intentions to solicit the commission of a crime. His remarks constitute political hyperbole and were merely a crude, offensive method of stating political opposition to the Nationalist Socialist Party.'" (R.T. p. 72, lines 11-22.)

Expressive of the trial judge's intention at the hearing is the minute order of January 26, 1979 which recites: "On the Court's own motion, good cause appearing, the minute order dated 1-18-79 is corrected nunc pro tunc to show the 995 motion

as having been denied as to the issue of intent but as having been granted as to the first amendment issue."[5/] (C.T. p. 181.)

The prosecution appealed the trial court's order of January 18, 1979, setting aside the information. (C.T. p. 182.) Subsequently, the Court of Appeal of the State of California, Second Appellate District, Division Two, filed its opinion, reported in 96 Cal.App.3d 968, 158 Cal. Rptr. 488, on September 17, 1979, reversing the trial court's order. In its opinion, the Court of Appeal ruled that "apart from First Amendment grounds, the information charging the crime of solicitation of murder is valid and is supported by probable cause." (96 Cal.App.3d at 974;

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5. The first sentence of the second complete paragraph on page 5 of the petition implies that the trial judge had not determined that there was probable cause to believe that, according to conventional standards applicable to 995 motions, petitioner solicited the commission of murder. We include in Appendix at pages 3a-7a statements by the trial judge which clearly show that he concluded that there was probable cause to believe that petitioner solicited murder. (R.T. p. 47, line 10 to p. 49, line 4; p. 49, line 27 to p. 51, line 2; p. 53, lines 2-8.)

petition, p. 3a.) The Court of Appeal rejected the contention that petitioner's advocacy was constitutionally protected.

VI. ARGUMENT

A

THE PETITION SHOULD BE DENIED BECAUSE OF FAILURE TO COMPLY WITH RULE 21.5

Rule 21.5 (formerly Rule 23, subd. 4) provides: "The failure of a petition to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Under the caption "STATEMENT OF THE CASE AND OF THE FACTS" at pages 3-4 and 10-11 of the petition, the following paragraph appears:

> "Finally, it was only at the end of the tape, much later in the press conference, that Mr. Rubin reiterated his offer of $500.00 to any member of the community in Skokie who kills, maims or seriously injures a member of the American Nazi party in the defense of the Jewish community, should any Nazi dream of attacking

a Jew like they did [end of tape]. (Emphasis added.)"

This just quoted paragraph purports to be a summary of the following excerpt of petitioner's remarks at the press conference:

> "R: And that means. We also have an added feature. We are offering five hundred dollars, that I have in my hand, to any member of the community, be he Gentile or Jewish, who kills, maims, or seriously injures a member of the American Nazi Party. This offer is being made on the East Coast, on the West Coat [sic]. And if they bring us the ears, we'll make it a thousand dollars. The fact of the matter is, that we're deadly serious. This is not said in jest, we are deadly serious. In the defense of the Jewish community, should any Nazi even dream of attacking a Jew like they did [end of tape.]" (C.T. p. 163, lines 12-22.)

The patent distortions of the remarks by petitioner appear to have been motivated by the need to plausibly contend, at page 11 of the petition, that: "Thus, as Mr. Rubin's words expressly stated, the 'offer' was conditioned upon: [¶] A. The march in Skokie, Illinois taking place. [¶] Proof that any action taken in response to Nazi attack was in defense of the Jewish or Gentile community." This contention must be evaluated in connection with another failure to accurately present the facts, viz., the statement of the second full paragraph on page 5 of the petition which implies that the trial judge did not conclude that, applying conventional standards to a 995 motion, there was probable cause to believe that petitioner had solicited murder.[6/]

Moreover, the same paragraph in the petition asserts:

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6. In this connection, the Court is invited to compare the second full paragraph on page 5 of the petition with the excerpts of the trial judge's remarks set forth at pages 3a-7a of the Appendix to our brief.

> "The Court then analyzed the defendant's words in light of the protections afforded by the First Amendment and concluded that based upon what it believes to be a proper interpretation of the law, and after comparing the language and the facts of Mr. Rubin's case with the cases cited by counsel there was insufficient evidence to constitute a probable cause to believe a crime was committed by the defendant. (RT: 72)."

This statement must be considered together with petitioner's claim, in the immediately preceding paragraph, that "[t]hroughout the hearing, the Court clearly indicated its understanding of the standard of review on a 995 motion. (RT: 48, 53, 54)."

Yet, critical to an understanding of the instant case, is that while the trial court apparently understood the "conventional standards" applicable to 995 motions, it is at least controversial whether it applied another standard of review to a

case involving a First Amendment issue.[7] This is patently the case if only for the fact that the trial judge denied the 995 motion as to the issue of intent but granted it as to the First Amendment issue by stating that petitioner's remarks evidenced a lack of any serious intentions to solicit the commission of a crime. (R.T. 72.)

From the foregoing, it is clear that petitioner is inviting this Court to ignore the Court of Appeal's determination that it was the "conclusion of the trial judge, in that under the standard of probable cause defendant's statements could be interpreted as a solicitation of murder" (96 Cal.App.3d at 974; petition, p. 3a) but that "[p]atently, the trial court reached its decision [that petitioner's statements were protected by the First Amendment] by weighing the quality

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7. The "conventional standards" applicable to 995 motions considered by trial courts exercising appellate functions are set forth in People v. Hall (1971) 3 Cal. 3d 992, 996, and quoted in the opinion by the Court of Appeal (96 Cal.App.3d at 973; petition, pp. 2a-3a.)

of Rubin's intent, determining it was not a truly serious intent" (96 Cal.App.3d at 974; petition, at p. 4a).

The implicit position of the Court of Appeal, with which this brief is in accord, was that the trial court's determination that petitioner's remarks at the press conference were constitutionally protected as a matter of law depended upon its finding of fact that petitioner had not seriously and truly intended to solicit murder, which finding of fact could only have been made by a procedurally unlawful departure from the conventional standards

applicable to 995 motions.[8/]

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8. See, e.g., the Court of Appeal's statement (96 Cal.App.3d 974; petition, pp. 3a-4a):

"The superior court, after concluding that probable cause existed to support the charge of solicitation of murder, went on to further conclude that Rubin's statements were protected as free speech by the First Amendment. The court arrived at this latter conclusion by deducing from the form and content of Rubin's statements that he had not seriously and truly intended to solicit murder, but had merely sought to attract national media attention. Rubin's statements, in the court's view, constituted no more than political hyperbole, and, as such, were protected against abridgement by the First Amendment. Accordingly, the court set aside the information. Patently, the trial court reached its decision by weighing the quality of Rubin's intent, determining it was not a truly serious intent, and thence concluding that the offer of reward for murder was advocacy rather than solicitation. The court arrived at this result even though Rubin himself at his press conference said he was not speaking in jest and was 'deadly serious,' and even though the specific intent with which an act is done presents an issue of fact."

Unfortunately, there have been serious breaches of the duty of petitioner to submit an objectively constructed statement of the case. As so well expressed in R. STERN AND GRESSMAN, SUPREME COURT PRACTICE (5th Ed. 1978) at pages 466-467:

> "It also bears emphasis that the Statement of the Case is not the place for argument or editorializing; that belongs in the subsequent section, the Reasons for Granting the Writ. The Statement is the place for accurately summarizing the relevant facts and the treatment accorded those facts by the courts below. The facts to be set forth, moreover, include more than just those favorable to the petitioner's case. The unfavorable facts, as well as those in dispute (and so labeled), must be given whenever necessary to a proper and full understanding of the case by the Court, but, if possible, they should be placed in a context suggesting why they are not controlling. The aim, in short, is to construct a Statement so complete yet succinct, so relevant

yet fair, that the Court can be assured that it has the facts essential to a resolution of the petition for certiorari."

B

THE PETITION SHOULD BE DENIED BECAUSE THE JUDGMENT OF WHICH REVIEW IS SOUGHT IS NOT FINAL WITHIN THE MEANING OF 28 U.S.C. § 257(3)

It is contended at pages 13-14 of the petition that the instant case falls within the ambit of the last category of cases deemed suitable for review by certiorari as described in Cox Broadcasting Company v. Cohn (1975) 420 U.S. 469, 482-483, 95 S.Ct. 1029, 1040, 43 L.Ed.2d 328, 342. A necessary element, as explained in Cox of that category applicable to the instant case, in which petitioner is awaiting trial on the crime charged following the state appellate court's reversal of the trial court's order setting aside the information, is "if a refusal immediately to review the state court decision might seriously erode federal policy" (420 U.S. at 483, 95 S.Ct. at 1040, 43 L.Ed.2d at 342.)

It is respectfully submitted that this last-mentioned element has not been satisfied. The Court of Appeal's decision

expressly analyses the First Amendment issue pertaining to petitioner's remarks at the press conference, as to which the Court of Appeal concluded there was probable cause to believe that petitioner thereby solicited murder, within the framework of the doctrine of Brandenburg v. Ohio (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, pertaining to advocacy of crime. The Brandenburg doctrine is "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action [footnote omitted]" (395 U.S. at 447, 89 S.Ct. at 1829, 23 L.Ed.2d at 434). Thus, even assuming arguendo that the Court of Appeal's application of the Brandenburg doctrine to the instant case is factually erroneous because either the imminency and/or likelihood prongs of the doctrine have been violated, the state appellate court has scrupulously refrained from eroding the meaning of the doctrine itself.

Under the circumstances of the instant case, where the state appellate court correctly, as we contend, determined that there is probable cause to believe that petitioner solicited the commission of murder of American Nazis by means calculated to appeal to the pecuniary interest of persons likely to be reached via the mass media, it is impossible for us to perceive what federal policy would be seriously eroded if there was a refusal to immediately review the decision of the Court of Appeal holding that the Brandenburg doctrine had been satisfied in the instant case.9/

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9. It must be remembered that petitioner waived five $100 bills when he made his offer. As he explained it: "I want people to know, that if they go out there and they take the consequences of being arrested, in either the attack of an American Nazi or whatever, that there are people who are grateful. That there are people who are right behind them 100%; and if money is a motivating factor, which it seems to be in America, that seems to be the bottom line, yeah. That's where we're at.

* * *

"People are motivated by money. Let's not kid around." (C.T. p. 149.)

C

THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEAL'S DECISION IS CORRECT

Finally, we respectfully submit, the petition should be denied because the Court of Appeal's decision reversing the trial court's order setting aside the information was correct for the reasons set forth in its opinion. The opinion carefully analyzes the concepts of imminency and likelihood, as entailed in the Brandenburg doctrine, and finds that they have been satisfied in the instant case, at least to make their applicability jury questions.

As we have seen, much of petitioner's argument depends upon the erroneous misinterpretation of the trial court's conduct. The Court of Appeal correctly perceived that the trial court made a finding of fact that the petitioner did not entertain a serious intention to solicit murder because the trial court failed to comply with the "conventional standards" applicable to the resolution of 995 motions. The state appellate court's conclusion that the magistrate had probable cause to believe petitioner

solicited the commission of murder is manifestly inconsistent with any argument that petitioner's offer was conditional upon any homicide, or other violent act, being done in the lawful defense of the Jewish or Gentile community. However, this argument can be successfully mounted only by reliance upon a finding of fact arrived at by the trial court applying other than conventional standards to the evidence presented to the magistrate. Applying conventional standards to the evidence, even the trial court concluded that the so-called defense of the community would not be lawful were it undertaken to prevent a Nazi march through Skokie. (See Appendix, pp. 1a-7a, infra.)

Petitioner's contention that somehow the imminency requirement of the Brandenburg doctrine was not satisfied because the offer was dependent upon the Nazi march taking place and that violence against Nazis would be in defense of the community. (See petition, pp. 10-13.) But this contention rests upon a logically vicious analysis of imminency as entailing likelihood. Petitioner thus argues that

"[a] statement conditioned upon events which might not occur could hardly be deemed imminent." (Petition, p. 12.) But if that is so it would have been redundant for the Brandenburg doctrine to expressly involve both imminence and likelihood. Obviously, the concept of likelihood of an event does not entail the non-impossibility of its occurence.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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APPENDIX

[APPENDIX]

Excerpt from preliminary hearing referred to in note 3, supra, in our brief:

MR. MINKIN: * * * This is the biggest bunch of garbage, quite frankly, that the Los Angeles Police Department and the District Attorney's Office of this County has ever been involved in, and they have been involved in plenty. This is just absolutely absurd that this kind of statement is prosecutable when it is obviously made by an emotional person in defense of the Jewish community and what is going on in Skokie. And if this Court wants to hold this man to answer for this statement, and you feel that it is a lawful ruling, then your judgment is far superior to mine, and I just have to live with it.

THE COURT: Submitted?

MR. MINKIN: Submitted.

THE COURT: I can't go into the motivation behind the filing of any action. That is up to the District Attorney.

MR. MINKIN: He will have to live with it, too.

THE COURT: If they file an action, that is their job. I have to then proceed

with the action in front of me. Bearing in mind this is a preliminary hearing, and the question now before me, whether there is a strong suspicion, not whether there is proof beyond a reasonable doubt, only whether there is a strong suspicion, a reasonable cause to believe that the offense has been committed, that is the only function I have here. This is not the trial situation, and it is not up to me to file cases or not to file cases or to dismiss cases which I think shouldn't have been filed. That is the function of the District Attorney's Office. I think in properly performing my function, which is what I have to do here, I have to conclude there is a strong suspicion based on the evidence that has been presented. That is the only finding I am making. The Court is denying your motion at this time. [C.T. p. 37, line 5 to p. 38, line 7.]

Excerpts from hearing on 995 motion referred to in note 4 on page 10 of our brief: [R.T. p. 47, line 10 to p. 49, line 4]:

THE COURT: Counsel, as I have indicated, I have read the transcript of the tape recording that was prepared for the Court and which is now People's 2.

I read the entire statement and I would like to read some portions of that statement.

Looking at page 27, line 13, the following language appears:

> "We're not going there under the intention to be pacifists. They like to have a nice nonviolent quiet protest. We're going there to take names and bury them if we have to. We're not going to allow Neo-Nazis to come into Skokie and advocate the Judacide of the Jewish people there."

Looking at page 1, line 14:

> "They are building a national movement. They've got money behind them, and we're fearful if we allow it to grow. We begged the Jewish community many years ago, that if we

don't stop the Nazis now, in several years they'll be marching through our community."

On page 2, line 9:

"April 20. And the Nazi plan to March through Skokie, Illinois, which is 70 percent Jewish, 7,000 survivors of the holocaust."

Coming down to line 16 on that same page:

"And we feel it's a desecration of our God, and we feel it's a desecration of the Jewish people to allow it to happen in the name of freedom of speech."

Same page, line 22:

"I think when you go up to people and you insult them verbally, if they literally punch your lights out, then that's what you should be expecting."

Now reading that language and using the standards which have been discussed at other hearings by this Court, and I am reading now from People vs. Mardian, M-a-r-d-i-a-n, 47 CalApp 3d at page 38. The following language appears:

"Consequently, on review, every legitimate inference which can

be drawn in favor of the information must be; and if the appellate court finds some evidence to support the commitment, it cannot inquire into the sufficiency of that evidence."

Bound by those standards I have no problem as I stated earlier, Mr. Michaelson, to give the language the interpretation that you suggest, but I do feel that looking at the entire transcript there is some evidence that the language indicates an intent other than the type of intent that you have suggested.

[R.T. p. 49, line 27 to p. 51, line 2]

THE COURT: Mr. Michaelson, let me make the record clear, maybe clear in your mind. What I mean when I am talking about solicitation, I am looking at page 28, commencing on line 13. Those are the words of solicitation which reads as follows:

"We are offering $500, that I have in my hand, to any member of the community, be he Gentile or Jewish, who kills, maims, or seriously injures a member of the American Nazi Party. This offer is being made on the East Coast, on

> the West Coast. And if they bring us the ears, we'll make it a thousand dollars. The fact of the matter is, that we're deadly serious."

Then the words that you felt indicate the intent of Mr. Rubin; that is, the key words that you want to stress on the Court read as follows:

> "In the defense of the Jewish community, should any Nazi even dream of attacking a Jew like they did . . ."

I appreciate this. However, in determining what the intent of an individual is, I believe you have agreed and I feel the law is clear that the Court can consider all of the circumstances surrounding the giving of that statement by Mr. Rubin, including the language that I read from the transcript because this was some of the language. This was the language which would indicate, in support of the position of the People as expressed by Mr. Swanson, and that is that while certainly your interpretation is valid, another interpretation is also a valid one and reasonable one which would indicate that there is some evidence

that his intent was not just to solicit in the name of self-defense but to solicit murder, for example, to prevent a march through Skokie which would be unlawful and not under the law of self-defense.

[R.T. p. 53, lines 2-8]

THE COURT: Well I think under the 995 standards I have no choice but to make the decision I have made.

I have given the matter a great deal of thought. I have gone over the transcript. I have read the cases, and I feel that my decision is the proper decision.

Let me take a short recess and then I will come back and hear the First Amendment arguments.